six months' imprisonment and the textiles were ordered to be forfeited.

Mr. Karpal Singh for the appellant submitted a preliminary issue on the point of law pertaining to the charge with a view to asking this court to exercise its powers of revision under section 325(i) of the Criminal Procedure Code on the ground that the charge as it stands is defective.

Section 13(1) of the Price Control Ordinance, 1946, (now the Price Control Act, 1946) gives power to the Price Controller with the approval of the Minister to make an order published in the *Gazette* for the purpose of the control of goods or classes of goods, and under sub-section (d) power is given to "prescribe marks or labels to be affixed by retailers to any goods or classes of goods or containers thereof indicating the quality, grade, price or place of origin of the goods." An order was made by the Controller under this section and published in the *Gazette*, vide P.U. 271 known as the Price Control (Indication of Grade and Prices) Order, 1967, which came into force on 15 June 1967. The relevant rule, *i.e.* Rule 2(1), states as follows: —

"Every retailer of the articles mentioned in the Schedule hereto shall affix labels or tags on the bags or containers of such articles offered for sale which are displayed in that part of the premises of the retailer to which the public have access indicating the grade and price of such articles."

Subsequently two further orders were gazetted in which the schedule was amended by adding other goods including textiles and ready-made garments. (P.U.(A) 512 dated 11 December 1969 and P.U.(A) 282 dated 7 September 1972).

The first order was referred to in the two subsequent orders as the "Principal Order" which is still in force. Rule 2(1) of the Principal Order on close scrutiny does not require labels or tags to be affixed to the goods or classes of goods but only to bags or containers of articles which are offered for sale and displayed in the premises of the retailer to which the public have access indicating the grade and price of such articles. Although section 13(1)(d) of the Act gives such power to the Price Controller, it seems to me that such provision does not appear in the said order. There appears to be no subsequent order published in the *Gazette* for this purpose. The position is that there is no order requiring retailers to affix tags or labels to any goods or classes of goods.

It is conceded by the learned Deputy Public Prosecutor that the charge as it stands is defective. However, he submitted that the appellant has not been misled by such error or omission because he was defended by counsel in the court below and no such objection was raised. He urged the court to take into consideration the provisions of sections 156 and 422 of the Criminal Procedure Code. He submitted that the appellant was in fact not misled by such error or omission and there was no failure of justice. The charge, he submitted, should be amended to the failure to affix labels or tags to the containers on which the textiles were placed.

A question arises as to whether the table on which the said articles were placed can be termed as "container" within the context of section 13 of the Act. It is not necessary for me to labour on this interpretation because the main question that arises now is whether an amendment to the charge can be made at this stage, assuming that I agree with the submission of the learned Deputy Public Prosecutor. In this connection I hold that it is too late since the charge in the court below as framed disclosed no offence known to law. (See *Tan Cheng Kooi & Anor.* v. *Public Prosecutor*[1]). Failure to affix any labels or tags on any goods or classes of goods which are displayed in the retailer's premises to which the public has access is not an offence because there has not been any order published in the *Gazette* making it an offence under section 13(1) of the Act. I say it is too late because the provisions of the Criminal Procedure Code require that before a charge can be amended such amendment should be read and explained to the accused who should then be called upon to plead to the charge as amended and be accorded the right to recall any prosecution witness for cross-examination. (See *Lee Swee Tee* v. *Public Prosecutor*[2]). Since the charge does not disclose any offence known to law, it is not necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned Deputy Public Prosecutor because there is an apparent miscarriage of justice.

In the circumstances I have no alternative but to hold that the trial and conviction in this case was a nullity and therefore the conviction must accordingly be quashed. The fine, if paid, must be refunded and the goods forfeited returned to the appellant.

Conviction quashed.

Solicitors: *Karpal Singh, Wong & Co.*

SAYAH BIN MUHAMMAD & ORS. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Syed Agil Barakbah J.) November 3, 1973]
[Alor Star — Civil Suit No. 170 of 1972]

Contract — Contract of employment as teachers by Government — Alleged breach of — Whether contract entered into or in execution of any public duty or authority — Whether action by teachers for salaries etc. barred — Public Authorities Protection Ordinance, 1948.

The plaintiffs applied for a declaration that they were entitled to be paid salaries and allowances in accordance with the scale for certificated Vernacular School Teachers and for repayment of deductions made from their salaries. The defendants, the Government of Malaysia, applied for an order that the proceedings be set aside on the ground that the action was not commenced within twelve months of the alleged act as required by section 2 of the Public Authorities Protection Ordinance, 1948.

Held: the relationship of the plaintiffs with the Government in this case was purely contractual and therefore the claim was not barred by the Public Authorities Protection Ordinance, 1948.

Cases referred to:-

(1) *Government of Malaysia* v. *Lee Hock Ning* [1973] 2 M.L.J. 51.

(2) *Milford Docks Co.* v. *Milford Hawen U.D.C.* (1901) 65 J.P. 483.

(3) *Bradford Corporation* v. *Myers* [1916] A.C. 242.

(4) *Griffiths* v. *Smith* [1941] A.C. 170 at p. 208.
(5) *Roshan Lal* v. *Union of India* A.I.R. 1967 S.C. 1889.
(6) *Government of Malaysia* v. *Rosalind Oh Lee Pek Im* [1973] 1 M.L.J. 222.

CIVIL SUIT.

Abdul Razak bin Datuk Abu Samah (Senior Federal Counsel) for the applicant.

Mohideen Abdul Kader for the respondent.

Syed Agil Barakbah J.: This is an application brought by way of summons-in-chambers by the Government of Malaysia (the defendant) for an order that the proceedings in this civil suit be set aside wholly with costs on the ground that the action was not commenced within twelve months from the date of the alleged act as required by section 2 of the Public Authorities Protection Ordinance, 1948, (hereinafter referred to as "the Ordinance")

The suit was originally brought by the plaintiffs for the following purposes: —

(1) A declaration that the plaintiffs were Certificated Vernacular School Teachers since 1 May 1957 and that the plaintiffs should have been paid salaries and allowances in accordance with the salary scale for Certificated Vernacular School Teachers from 1 May 1957.
(2) Repayment to the plaintiffs by the defendant of all deductions from the plaintiffs' salaries made by the defendant in accordance with the direction contained in letters dated 23 June 1968 from the Ketua Pelajaran, Perlis, to the Headmasters of the schools where the plaintiffs were employed.
(3) Interest on the deductions at 6% per annum from the date of deduction to the date of repayment.
(4) Arrears of salaries and allowance since 1 August 1968.
(5) Costs.
(6) Such further or other relief as the court may deem fit.

The plaintiffs alleged that they were employed as teachers by the defendant under a scheme known as the Teachers in Vernacular Schools Scheme since 1953. Having passed the final examination prescribed in the course of training they were appointed Certificated Vernacular School Teachers on May 1, 1957. It was a term of the contract of employment between the plaintiffs and the defendant that from that date the former should be paid salaries and allowances according to the salary scale for Certificated Vernacular School Teachers. It is alleged that the defendant did not pay them such salaries according to the scale until February 1, 1959. Subsequently on April 13, 1968, the Chief Education Officer, Perlis, as servant of the defendant, sent written directives to the Headmasters of the schools where the plaintiffs were employed to rectify the abovesaid anomaly. As a result, the plaintiffs' salaries were increased to the level of the salary scale commensurate with their qualifications and experience and were also paid arrears of salaries and allowances which they received. Subsequently by letters dated June 23, 1968, the same Chief Education Officer cancelled the former directives. The plaintiffs were reverted to their former salaries and allowances prior to the directives dated April 13, 1968. Their monthly salaries were also deducted in order to recover the arrears of salaries already paid to them. It is alleged that the deductions have been made without the consent of the plaintiffs and contrary to the terms and contract of employment with the defendant. The plaintiffs have petitioned the Ministry of Education on the matter but without any success.

Now, section 2 of the Ordinance states as follows: —

"2. Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof;
(b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

. . . ."

The question that arises is whether the failure by the defendant to pay the salaries and allowances as claimed by the plaintiffs to them in accordance with the salary scale for Certificated Vernacular School Teachers was a default in the execution of a written law, public duty or authority.

Senior Federal Counsel Encik Abdul Razak bin Datuk Abu Samah appears for the applicant (defendant) and Encik Mohideen Abdul Kader for the respondents (plaintiffs).

It is conceded by both learned counsel that there was an implied contract of employment between the applicant and the respondents. The learned Senior Federal Counsel however was not sure whether there is any statutory duty for the appointment of teachers. He submitted that the appointments were made under the Federation of Malaya Schemes of Service, 1956, page 85 of which deals with the scales of salary of certificated teachers, particularly at paragraph 11 which states as follows: —

"11. Teachers in training not in an approved College or Institution who have passed the final examination prescribed in their course of training, and have received a satisfactory report on their work and conduct from the Head of their Department, will be appointed as Vernacular School Teachers (Certificated). Those who obtain a First Class Certificate will enter the timescale two increments above the minimum; and those who obtain a Third Class Certificate will enter the timescale at the minimum. Certificated Teachers will be on probation for a period of two years."

He further said he was not relying on the first limb of the section, *i.e.* "any written law", but on the second limb, *i.e.* "any public duty or authority".

I have had the advantage of reading the recent judgment of their Lordships of the Privy Council in *Government of Malaysia* v. *Lee Hock Ning*[1] which deals with the principles applicable to the section of the Ordinance. Firstly, it is held that cases arising out of breach of contract fall within the ambit of the Ordinances thus dispelling the hitherto accepted view

as held in *Milford Docks Co.* v. *Milford Haven U.D.C.*[2]

The whole issue rests on the construction of section 2. Now, in order to satisfy the conditions of the section, the act must be done "in pursuance or execution or intended execution of any written law or any public duty or authority" or the neglect or default must be "in the execution of any such written law, duty or authority". Lord Buckmaster in *Bradford Corporation* v. *Myers*[3] said: —

"... it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute or in the discharge of a public duty, or the exercise of a public authority."

Secondly, their Lordships observed in *Lee Hock Ning's* case that, in all the cases in which the neglect complained of was pure breach of contract, the constitution of the contract itself was a statutory duty either imposed on the authority or which the authority had imposed upon itself under statutory powers conferred on that behalf. In those cases the action was held to be protected by the Public Authorities Protection Act. The performance of a public duty through the medium of a contract must however be distinguished from the entering into a private contract in pursuance of an Act of Parliament which was the issue in *Lee Hock Ning's* case. It was held that the right of the respondent was not correlated with any statutory right or duty which was the provision of education but with the obligations entered into by the appellants in their contract with the respondent whose claim was not barred by the Ordinance.

The present case, in my view, does not seem to fall under either category stated above. In the first place, as conceded by the Senior Federal Counsel, the Federation of Malaya Schemes of Service is not a written law nor made under any powers given by statute and does not appear to be one which the Government has imposed upon itself under statutory powers. In the second place, though it is implied that a private contract has been entered into between the parties, it does not appear to have been done in pursuance of an Act of Parliament. It is difficult, if not impossible, to lay down any general principle to determine these questions. That was stressed by their Lordships in *Lee Hock Ning's* case. Nevertheless within the limits of what have been argued before me, the principle that should apply to this case is as stated in *Griffiths* v. *Smith*[4] as "the true position". Lord Porter says as follows: —

"If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising. A municipal tramway car depends for its existence and conduct on, say, a private and many public Acts, and the corporation in running it is performing a public duty. When a citizen boards such a car, in one sense he makes, by paying his fare, a contract; but the boarding of the car, the payment of the fare, and the charging of the corporation with the responsibility for safe carriage are all matters of right on the part of the passenger, a public right of carriage which he shares with all his fellow citizens, correlative to the public duty which the corporation owes to all. Similarly, when a municipality, by virtue of private and public statutes, carries on a gas undertaking, the public duty of manufacture and supply finds its correlative in the right of the consumer, a public right which he has in common with all his fellow householders, to supply and to service. In both of these cases, accordingly, the Public Authorities Protection Act applies.

But where the right of the individual cannot be correlated with a statutory or public duty to the individual, the foundation of the relations of parties does not lie in anything but a private bargain which it was open for either the municipality or the individual citizen, consumer, or customer to enter into or to decline. And an action on either side founded on the performance or non-performance of that contract is one to which the Protection Act does not apply, because the appeal, which is made to a court of law, does not rest on statutory or public duty, but merely on a private and individual bargain."

In the case before me the right of the individual teachers, namely, the plaintiffs, cannot be correlated with any public duty or authority as it depends upon the execution of a contract between the parties, the performance or non-performance of which is entirely left to the parties concerned. The neglect or default cannot be said to be done in the execution of a public duty or authority. Moreover, their relationship with the Government is contractual unless their rights and obligations are determined by statute or statutory rules which may be framed by the Government. (See *Roshan Lal* v. *Union of India*[5] and *Government of Malaysia* v. *Rosalind Oh Lee Pek Im*[6]). The Federation of Malaya Schemes of Service referred to is not a written law and is not relied on by the Senior Federal Counsel as such in order to substantiate his argument. I am satisfied that the claim is not barred by the Public Authorities Protection Ordinance.

In view of the above, it is not necessary to consider the second ground of objection.

I therefore dismiss the application with costs.

Application dismissed.

LAU FOO SUN v. GOVERNMENT OF MALAYSIA

[F.C. (Azmi L.P., Suffian C.J. and Ali F.J.) November 20, 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 92 of 1969]

Copyright — Literary work — Whether engineering drawings and designs prepared by engineer constitute original "literary works" — Copyright Enactment (F.M.S. Cap. 73), ss. 2, 3 & 8.

Engineers — Engineering drawings and designs — Copyright in.

The appellant, a chartered civil and structural engineer, had claimed a declaration that he was entitled to the copyright in the engineering drawings and designs prepared by him for the construction of double-storey classrooms for school for the Government. It was held in the High Court ([1970] 1 M.L.J. 20) that the appellant in preparing the drawings had substantially copied from P.W.D. drawings and therefore the appellant's drawings and designs were not original literary works so as to qualify for copyright under the Copyright Enactment. The appellant appealed.

Held, allowing the appeal: the respondent had not rebutted the presumption that copyright existed in the appellant's works, as they had failed to prove that the appellant's works were nothing more than direct tracings of other original works or drawings. The engineering drawings and designs were "literary work" within the meaning of the Copyright Enactment and they were also "original literary work" within the meaning of the Enactment.

Cases referred to:-

(1) *University of London Press Limited* v. *University Tutorial Press Limited* [1916] 2 Ch. 601.